

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of G.M., and the)
School City of Whiting, and the)
School City of East Chicago) **Article 7 Hearing No. 1594.06**
)
Appeal from a Decision of)
Thomas J. Huberty, Ph. D.,)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History and Background

On July 10, 2006, the Indiana Department of Education, Division of Exceptional Learners received a due process hearing request from the School City of Whiting and School City of East Chicago (hereafter collectively referred to as “Schools”) in respect to the matter of G.M. (hereafter “Student”), a seven-year-old child with Down’s Syndrome. On July 11, 2006, Thomas J. Huberty, Ph.D., was appointed by the State Superintendent of Public Instruction as the presiding Independent Hearing Officer (IHO).

In a letter dated July 10, 2006, the Schools moved to conduct an educational assessment of the Student, asserting that the Student’s mother would not consent to such an evaluation in a case conference in May 2006. Thereafter, the Student’s mother informed the IHO that she was attempting to obtain legal representation; thus, a ruling on the Schools’ motion to evaluate was held in abeyance. A prehearing conference was convened on August 21, 2006, at which time the School’s motion to evaluate was discussed in detail. The Student was neither represented by counsel nor an advocate at that time. On August 29, 2006, the Schools’ motion to evaluate was granted, with the understanding that the Schools would submit a detailed plan for the evaluation. On September 11, 2006, the Schools submitted a plan providing for the Student’s occupational therapy, physical therapy, and speech and language evaluations, as well as a psychoeducational assessment consisting of cognitive ability, academic abilities, visual motor integration skills, and adaptive behavior. Additionally, an assistive technology evaluation and functional behavior assessment were proposed. The plans were accepted by the IHO on September 14, 2006.

During the prehearing conference, the Schools proposed that the Student attend kindergarten under the supervision of a full-time aide for approximately two hours a day, as recommended by his physician. The Student had attended preschool during 2005-2006. In a letter dated August 29, 2006, the IHO approved the proposal for interim placement and required the Schools to provide a report of the Student's performance in the kindergarten classroom after eight (8) instructional days, with other reports as needed. On October 3, 2006, an incident occurred at the school during which the Student's mother entered the classroom with a photographer who took pictures of the Student. The Schools sent a letter to the parent on that day, detailing its visitation policy and prohibiting her from returning to the School due to her failure to adhere to such policies. Upon receipt of the letter, the parent removed the Student from school, indicating during the hearing that she would not return him until a decision was issued. By a letter dated August 29, 2006, the IHO granted the Schools' request for an extension of time for decision until November 27, 2006.

Two issues were delineated for the hearing:

1. What is the appropriate program for the Student from the date of the hearing decision?
2. What is the least restrictive environment for the Student?

After it was determined that the Student's mother was unable to obtain representation, a prehearing order was issued on October 3, 2006, with the exchange of exhibits, exhibit lists, and witness lists to be completed by October 12, 2006. The Schools complied with the exchange, but the Student did not submit any exhibits or a witness list. As such, all witnesses were called by the Schools, with the Student's mother giving an opening statement and statement under oath at the conclusion of all witness testimony. The latter statement would serve as her closing statement. The Schools made both opening and closing statements and carried the burden of persuasion, as set forth in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 533-34 (2005).

The hearing was convened on October 19, 2006, and was concluded that same day. Just prior to the hearing, procedures and exhibits were discussed in a prehearing conference. The IHO explained the procedures for the hearing as well as the rights of the Student's mother. The Student's mother was accompanied by an advocate who served in an advisory capacity and did not participate in the examination of witnesses or otherwise represent the Student. The parent had no objection to the Schools' exhibits. Until the day of the hearing, the parent had not decided if the proceedings were to be opened or closed to the public. On that day, she determined that the hearing would be open. Witnesses were separated, administered an oath, and instructed not to discuss their testimony with others or permit others to discuss their testimony with them. The Student's mother requested written copies of the transcript and decision. Testimony began at approximately 9:00 a.m., with the hearing concluding at approximately 4:30 p.m.

The IHO's Written Decision

The IHO issued his written decision on November 24, 2006, setting forth twenty-six (26) Findings of Fact.¹

The IHO's Findings of Fact

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5.3 *et seq.* and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. It was determined that all due process procedures were in compliance with the requirements of 511 IAC 7-30-3 and IC 4-21.5.3 *et seq.*
4. The Student is seven (7) years of age and has been determined to be eligible for special education services as a student with a Moderate Mental Disability (MoMD). He has Down's syndrome and is described as having significant developmental delays in multiple areas.
5. The Student is described as having a pleasant personality, is happy, is well-accepted by other children, and has enjoyed school. He also is seen to have a relative strength in social skills.
6. He was evaluated in August 2005 at the age of six years, three months by the School and found to be in the "Moderately Delayed" range of cognitive ability. An attempt was made to assess early academic and language skills, but no standard scores were available because all raw scores were "0." Visual motor integration skills were at the <.02 percentile, indicating significant delay. A developmental profile interview with the mother was completed, which indicated that physical, self-help, social, academic and communication skills ranged from age equivalents of 26 to 38 months. These results indicated that he was about three to four years delayed compared to his chronological age.
7. A speech and language evaluation also was completed in August 2005. No test could be given in its entirety, partly because the Student refused to participate. His mother was in attendance during this evaluation. The results indicated that he had a severe delay/disorder in auditory comprehension of language, expressive communication, and articulation skills. His spontaneous speech was noted to be about 15-20 words and his mother reported that he "...doesn't talk meaningfully at home most of the

¹ The IHO's decision is reproduced in the entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

time; he uses gestures to communicate. He does babble quite a bit.” He used mostly one-word responses and followed simple directions.

8. A case conference was convened in August 2005 to discuss placement, and another conference was convened in September 2005. The mother refused any special education services and the Student was enrolled in the preschool program. She did not give consent for occupational therapy, physical therapy, and assistive technology evaluations.
9. Subsequent to the IHO’s order permitting the School to evaluate the Student, evaluations were completed in September and October 2006. The psychoeducational evaluation was conducted by the same school psychologist who evaluated the Student in 2005. Cognitive ability was determined to be similar to that obtained in 2005 as “Moderately Delayed.” An adaptive behavior assessment completed by his mother indicated that skills in Communication, Community Use, Functional Academics, Home Living, Health and Safety, and Self-Direction standard scores ranged from one (1) to four (4) and in the Extremely Low range. A teacher version of the adaptive behavior measure rated all areas as “Extremely Low,” with all subtest standard scores being one (1), and a Functional Academics score of two (2). Visual-motor integration skills were at the two year, ten month level. A behavior rating scale completed by the mother indicated “at-risk” in Attention problems and Functional Communication. The current kindergarten teacher completed the teacher version of the scale and “at-risk” scores were in Hyperactivity, Attention Problems, Learning Problems, Adaptability, Social Skills, Leadership, and Study Skills. School Problems and Behavioral Symptoms indices also were in the at-risk range, including disruption of other children’s activities, difficulty waiting his turn, and occasional difficulty adjusting to setback or changes in routine. Testimony from the school psychologist indicated that the Student was given “breaks” during the testing time.
10. The school psychologist and the classroom teacher reported seeing rocking and “hand-flapping” during the evaluation and in the classroom, respectively.
11. A speech and language evaluation was conducted by the same speech pathologist who evaluated him in 2005. Results indicated that the Student shows a severe delay/disorder in receptive comprehension, expression of language skills, and articulation skills. A formal assessment could not be completed due to limited ability and noncompliance. He showed about 20-30 vocabulary words that are difficult to understand. He occasionally plays with others, but is by himself most of the time in the classroom. He repeats 1-3 word sentences and uses growling, grunts, and random vocalizations. Augmentative technical assistance and a picture communication board and assistive device were recommended. Speech therapy services of 120 minutes per month were recommended, which is an increase from the recommended 80 minutes per month last year.

12. A physical therapy evaluation conducted in September 2006 indicated that the Student has decreased gross motor coordination skills, motor planning, strength and balance, inefficient transitional movements, locomotion, and poor posture that impacts school skills. Overall gross motor skills were noted to be at the four year, two month level with all standard scores being one (1). The therapist recommended 90 minutes per month of physical therapy.
13. The occupational therapy evaluation indicated that the Student had a poor attention span and was unwilling to attempt several activities. He does not follow verbal directions, does not transition well between activities, and does not follow the classroom routine. Self-care skills were not fully assessed, but teacher reports indicated that the Student continues to wear a diaper, is not “potty trained,” and does not wash hands independently. He has immature grasping patterns, cannot cut easily, and does not show hand preference. His school skills are impacted negatively by short attention span, poor posture, sensory processing issues, and poor fine motor/motor planning skills. The therapist recommended direct therapy of 90 minutes per month plus classroom consultation.
14. The assistive technology indicated that the Student needs a more effective communication system and recommended use of a pencil grip, a slant board to improve writing skills, and a voice augmentative communication to assist in understanding the Student’s communication.
15. The Student brings a piece of netting similar to a blanket to class with him, which the mother describes is to help calm and organize his thoughts.
16. There is no evidence in the record and testimony to indicate that evaluation of the Student in 2005 or 2006 was done inappropriately or not in compliance with provisions of Indiana Article 7 and the Individuals with Disabilities Education Act.
17. The functional behavior assessment indicated that the Student shows noncompliant behavior when requested to join a group or complete an academic task. At times, he can be redirected, but it is not always successful. Strengths included looking through books, music, and a computer. He likes the teacher and the aide at times, books, a few students, and the netting. Behavioral problems included throwing things, yelling, hitting, pushing, kicking, grabbing feet of other students, and continuing with defiant behaviors when he is aware of them. The behaviors are considered to be distracting, unsafe and inappropriate. He dislikes being told what to do, being directed, or transitioning to other activities. The evidence indicates that the responses of the teacher and aide to these behaviors were appropriate.
18. Subsequent to the functional behavior assessment, a behavior intervention plan was developed with two problem behaviors noted: (1) lack of participation in group activities due to refusal to sit/stand with the group, and (2) the student is distracting others and himself with the net blanket. Behavioral goals were to have the Student

- participate in group activities and carry the netting only during break times. Four and three interventions were listed for each of the goals, respectively.
19. The Student needs one-to-one teaching, concrete instruction, repetition of learning, and re-teaching of previously learned material, due to forgetting the skills.
 20. The Student did not meet any of his IEP goals in 2005-2006 and is not making satisfactory progress on current goals.
 21. The Student's physician has recommended limited attendance at school to about two hours due to his cognitive ability and tendency to become tired. There is no evidence that the Student has any chronic health problems that would limit his attendance at school on a full-time basis.
 22. The Student cannot identify many letters, colors, or number concepts and participates in less than 10% of the kindergarten activities. Often, he spends much time alone for several minutes at a time or takes up the space of other children in the room. He frequently pushes objects off tables, ignores directions and redirection, and is noncompliant. The Student is receiving minimal academic benefit from being included in the kindergarten classroom.
 23. Overall, the Student's functioning is similar to that of a three-year old child with respect to his cognitive and academic skills, with somewhat higher social and motor skills, all of which are below his chronological age.
 24. In the kindergarten classroom, the teacher observed that the Student can be disruptive, that the aide needs to do most things for him, that he spends much time by himself, that he has been seen to rock and "hand flap," and that he is not deriving much benefit from the setting. He is happy, likes to listen to stories, will sit in groups at times, and will raise his hand to answer questions at times, although he is difficult to understand. She believes that he can attend school all day, if he is given rest time, and she does not see him as fragile in the classroom. He needs one-on-one instruction most of the time. Other children play with him and he is benefiting from social interactions and the listening activities.
 25. The Student's mother testified that she believes the Student's best interests are served in a typical kindergarten by being around other children and not receiving special instruction. She stated that he is totally independent and has skills more similar to an eight-year old child. This statement is inconsistent with what she reported his adaptive skills to be in the evaluations of 2005 and 2006.
 26. All school personnel were properly trained and licensed in their respective areas of specialty.

The IHO's Conclusions of Law

Based upon these Findings of Fact, the IHO reached four (4) Conclusions of Law.

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5.3 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law.
3. **Issue #1: What is the appropriate program for the Student from the date of the hearing decision?**

The IEP, as proposed by the School in May 2005, contains appropriate and measurable goals and benchmarks. The IEP should be amended to include the results of the most recent educational evaluation that included a psychoeducational assessment and occupational therapy, physical therapy, speech and language therapy, and assistive technology evaluations, as well as the functional behavior assessment. The evidence and testimony clearly support that the Student needs the services recommended by the School in order to make progress in the curriculum and to derive benefit from his education. Although he is deriving some minimal social benefit in the kindergarten classroom, he is not making sufficient progress toward his academic goals and benchmarks. More direct instruction is needed.
4. **Issue #2: What is the least restrictive environment for the Student?**

The concept of least restrictive environment directs that, to the maximum extent possible, students with disabilities are educated with nondisabled students (511 IAC 7-27-9(a)(1)), and that removal from the general education environment is to occur only when it is documented that education in general education classes using supplementary aids and services can be satisfactorily achieved (511 IAC 7-29-9(a)(2)). The least restrictive environment for a given student may not necessarily be a general education classroom in the local school building if it does not provide for a free appropriate public education. It is well-established that parents, no matter how well meaning, cannot compel a school to adopt a specific methodology if its program is appropriate (*Lachman v. Illinois Board of Education*, 853 F.2d 290 (7th Cir. 1988)). In this matter, the School has proposed an IEP with recommended additions that are appropriate and designed to confer educational benefit to the Student. Further, a school is not required to create a classroom or otherwise provide services to a student in the local school if an appropriate program exists in another location. Therefore, the least restrictive environment for this Student is the program in the elementary school operated by the special education cooperative where the MoMD program is located, because he cannot be educated appropriately in the general education classroom in his local school.

The IHO's Orders

Based on the Findings of Fact and the Conclusions of Law, the IHO issued the following six (6) orders:

1. The Student is to be placed in the program located in the elementary school proposed by the School, effective on the date of this decision;
2. The proposed IEP of May 2006 is to be implemented with the following changes:
 - a. The results of the most recent educational evaluations are to be included in the IEP, including updated statements of present levels of performance;
 - b. Develop and implement goals and benchmarks for self-help skills as recommended by the School, including toileting, fastening, and self-feeding skills, accompanied by a necessary ongoing evaluation;
 - c. Develop and implement goals and benchmarks as recommended in the area of fine motor skills and sensory input, including handwriting skills and accompanied by any necessary ongoing evaluation;
 - d. Develop and implement goals and benchmarks as recommended in the area of gross motor skills, including muscle tone, posture, and balance to improve access and mobility in the school (e.g., climbing stairs), and to enhance academic achievement, accompanied by ongoing evaluation as necessary;
 - e. Evaluate the current behavior intervention plan for diagnostic purposes and revise as necessary through appropriate functional behavior assessment after the Student acclimates to the new school setting;
 - f. Provide ninety (90) minutes per month of physical therapy with ongoing evaluation as necessary;
 - g. Provide ninety (90) minutes per month of occupational therapy with ongoing evaluation as necessary;
 - h. Provide 120 minutes per month of speech therapy with ongoing evaluation as necessary;
 - i. Provide assistive technology devices and services to enhance writing activities and communication abilities with ongoing evaluation as necessary.
3. The Student will attend a full day of school, but the case conference committee shall include provisions for appropriate rest periods, activities, and accommodations to prevent fatigue, noncompliance, and resistance. These accommodations shall be focused specifically on enabling the Student to benefit from his educational program.

4. All adjustment, accommodations and additional services shall be focused specifically on enabling the Student to benefit from his educational program.
5. These orders are to be implemented no later than thirty (30) calendar days following receipt of this decision unless appealed to the Indiana Department of Education.
6. The Indiana Department of Education shall monitor the implementation of these orders.

The IHO properly notified the parties of their respective administrative appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Procedural History of the Appeal

The Student's mother timely filed a Petition for Impartial Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review was received by the Indiana Department of Education on behalf of the BSEA on December 13, 2006. On December 19, 2006, the Student's mother sent an additional letter to the BSEA, attempting to state her grounds for appeal and explain parts of her testimony at the hearing. She included a letter from a pediatric speech pathologist, who had written on her behalf, and who had attested to her fitness as a parent. The letters were received by the Indiana Department of Education on December 22, 2006, and were forwarded to the BSEA on that same day.

In a letter dated December 27, 2006, and pursuant to 511 IAC 7-30-4(i), the Schools requested an extension of time until January 22, 2007, to respond to the Student's Petition for Impartial Review. The request was forwarded to, and approved by, the BSEA on that same day. Additionally, the BSEA extended the timelines for review and issuance of a written decision to and including February 21, 2007.

On January 22, 2007, the Schools submitted a timely response to the Student's Petition for Impartial Review pursuant to 511 IAC 7-30-4(f).

On February 1, 2007, the Indiana Department of Education, on behalf of the BSEA, received a letter from the Student's mother. The letter stated her reasons for believing full inclusion to be the least restrictive environment for the Student. Therein, the Student's mother cited laws providing that students are entitled to a FAPE irrespective of disability, and referred to a resolution calling for the inclusion of all disabled students in the public school system. The letter also expressed her fears that the failure to include her son in general education kindergarten would create feelings of isolation and cause him to be ostracized. As such, the IHO's decision would negatively affect her son's future.

On February 6, 2007, the parties were notified that the BSEA would conduct its impartial review on February 12, 2007, without oral argument.

Student's Petition for Review

As noted *supra*, the Student filed his Petition for Review on December 13, 2006.³ The letter, submitted by the Student's mother, was a general notification to the BSEA that the Student desired to appeal the IHO's decision. Thereafter, she supplemented the letter with an additional letter dated December 19, 2006, in which she attempted to more clearly state her exceptions to the IHO's conclusions of law. The second letter generally challenged the IHO's findings as a whole and requested that the BSEA review the entire case from beginning to end. It also included a statement by the Student's mother to the effect that the IHO erred in concluding that placement in the MoMD developmental program was the least restrictive learning environment for the Student, given his current mental status and cognitive abilities.

Further, the Student's mother argued that her testimony had been misconstrued during the hearing, and that the IHO did not take into account the full amount of evidence as a result.

Schools' Response to the Petition for Review

As stated above, the Schools timely filed on January 22, 2007, their Response to the Student's Petition for Impartial Review pursuant to 511 IAC 7-30-4(f).

The response first asserts that the Student's Petition for Impartial Review fails to specifically take exception to any of the IHO's conclusions of law, and merely challenges the IHO's findings as a whole. Moreover, the Schools assert that because the Student failed to admit any exhibits at the trial, and because no new evidence can be heard on appeal, the reference letter written by the speech pathologist is barred from consideration as evidence. Similarly, the Schools argue, the letter does not meet the definition of newly discovered evidence.

The Schools conclude by asserting that the IHO's findings of fact, conclusions of law, and orders are supported by the substantial evidence presented at the hearing, and that the IHO's decision was not arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege or immunity; in excess of the jurisdiction of the IHO; or reached in violation of an established procedure.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The BSEA reviewed this matter on February 12, 2007, without oral argument and without the presence of the parties. All three members of the BSEA participated.² Each had received and reviewed the record from the due process hearing below, as well as the Petition for Review and the Response thereto. In consideration of same, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

³ The BSEA notes the Student uses various dates for when the hearing was requested and when her Petition for Review was filed. The BSEA has determined the actual dates based upon the record.

² Dennis Graft, Esq., was appointed to serve as a BSEA member for this appeal in place of Raymond W. Quist, Ph.D., who is ill.

Combined Findings of Fact and Conclusions of Law

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law; contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The Student requested a general review of the IHO's written decision. A Petition for Review is required to be specific as to the reasons for the exceptions to the IHO's written decision, "identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]" 511 IAC 7-30-4(d)(3). Even though the Student requested a general review and was not specific as to exceptions, the BSEA did review the written decision of the IHO in light of the two identified issues for the hearing.
3. After a review of the record as a whole, with special attention to the written decision of the IHO, the BSEA finds that the record supports all of the IHO's Findings of Fact. The Findings of Fact support the Conclusions of Law. The Conclusions of Law support the resulting Orders.
4. The BSEA noted the Student, in the letter of February 1, 2007, requested a copy of the transcript. The record indicates a copy of the transcript was sent to the Student's representative on January 26, 2007.
5. Notwithstanding the above, the BSEA did note typographical errors that do not affect the substance of the IHO's written decision. Conclusion of Law No. 3 refers to "[t]he IEP, as proposed by the School in May 2005..." The record and the other portions of the IHO's written decision indicate that this should read "May 2006" rather than "May 2005."
6. In Conclusion of Law No. 4, the IHO wrote "that removal from the general education environment is to occur only when it is documented that education in general education classes using supplementary aids and services can be satisfactorily achieved (511 IAC 7-29-9(a)(2))." This should read "that removal from the general education environment is to occur only when it is documented that education in general education classes using supplementary aids and services **cannot** be satisfactorily achieved (511 IAC **7-27-9(a)(2)**)." "Cannot" was intended. The citation is corrected.
7. In Order No. 1, to ensure there will be no uncertainty as to the intent of the IHO, the Order is rewritten as follows: "The Student is to be placed in the MOMD program

located in the elementary school proposed by the School, effective on the date of this decision.”

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.
2. The IHO’s written decision, as amended to address typographical errors, is sustained in its entirety.
3. All decisions in this regard were unanimous.

DATE: February 12, 2007

/s/ Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-30-4(n).